2009

Sharlene Call v. John E. Keiter M.D : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

SHARLENE CALL, Plaintiff/Appellee, vs. JOHN E. KEITER, M.D, Defendant/Appellant.	Case No. 20090051

BRIEF OF APPELLANT

Appeal from a Final Order of the Second District Court, Weber County, State of Utah, Judge Brent W. West

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PARTIES TO THE PROCEEDING

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QUESTIONS PRESENTED FOR REVIEW

Issue I: When there was no dispute of the material fact that Ms. Call knew of Dr. Keiter's alleged negligence before the statute of limitations ran and Ms. Call's own expert was critical of care provided before the statute of limitations ran, did the trial court err in partially denying Dr. Keiter's motion for summary judgment and in allowing Ms. Call to split her claim to seek damages only for care provided after a cut-off date chosen by Ms. Call?

Standard of Review: On appeal from a summary judgment motion, the appellate court reviews the facts and inferences in the light most favorable to the nonmoving party. *See Higgins v. Salt Lake County*, 855 P.2d 231, 233 (Utah 1993). Whether a party is entitled to summary judgment presents a question of law and the appellate court grants no deference to the trial court's legal conclusions and reviews them for correctness. *See Higgins*, 855 P.2d at 235; *Stangl v. Ernst Home Ctr.*, 948 P.2d 356, 360 (Utah Ct. App. 1997). On appeal, the appellate court needs only to review whether the trial court erred in its application of the law and whether a material fact was in dispute. *See Holmes Dev., LLC v. Cook*, 2002 UT 38, ¶21, 48 P.3d 895.

Issue Preserved: Record at 261-340; 413-14; 736-743; 933-36; 1815: 36-75; 1816: 3-5; 1819: 328-331.

Issue II: Dr. Keiter provided the trial court with a factual predicate that demonstrated the breast implant was defective and leaked silicone into Ms. Call's body and Ms. Call's own expert proved that the leaked silicone triggered the chain of events that led to Dr. Keiter's treatment. Did the trial court err when it precluded Dr. Keiter from listing the implant manufacturer on the special verdict form for purposes of apportionment of fault?

Standard of Review: The trial court's application of the Liability Reform Act in apportioning fault is a question of law, reviewed for correctness. *Bishop v. GenTec Inc.*, 2002 UT 36, ¶8, 48 P.3d 218. Because the issue presented in this case is specific to the use of a special verdict to apportion fault in accordance with the LRA, the correctness standard should control. There is, however, some uncertainty with regard to the standard that applies to the use of special verdicts in general. *Compare Clayton v. Ford Motor Co.*, 2009 UT App 154, ¶7, ___ P.3d ___ (June 11, 2009) ("'The use of special verdicts or interrogatories is a matter for the trial court's sound discretion.'" (citation omitted)) *with Hart v. Salt Lake County*, 945 P.2d 125, 136 (Utah Ct. App. 1997) ("A special verdict form is a jury instruction, and determining the propriety of jury instructions presents a question of law we review for correctness.").

Issue Preserved: Record at 95-97; 655-57; 944-972; 977-995; 1800: 666-72; 1821: 825-34, 876-77, 900; 1822: 910-16, 937.

Issue III: After partially denying Dr. Keiter's motion for summary judgment and precluding Dr. Keiter from apportioning fault to the implant manufacturer, did the trial

court further err when it denied Dr. Keiter's motion for a directed verdict and his post-trial motions on these issues?

Standard of Review: When reviewing a party's motion for a directed verdict, the standard is whether reasonable minds could differ on the evidence presented. If reasonable minds could not differ on the evidence, the trial court erred in denying Dr. Keiter's motion. *See Management of Graystone Pine Homeowner's Ass'n ex rel. Owners of Condominiums v. Graystone Pines, Inc.*, 652 P.2d 896 (Utah 1982). In reviewing a motion for a new trial, the trial court has broad discretion in ruling on such a motion. *See Crookston v. Fire Ins. Exch.*, 817 P.2d 789 (Utah 1991).

Issue Preserved: Record at 1287-89; 1290-1346; 1442-1688; 1820: 479-93.

JURISDICTIONAL STATEMENT

This court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78A-4-103(2)(j).

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES, AND REGULATIONS

Rule 56 of the Utah Rules of Civil Procedure. *See* Addendum

Utah Code § 78B-3-404

(1) A malpractice action against a health care provider shall be commenced within two years after the plaintiff or patient discovers, or through the use of reasonable diligence should have discovered the injury, whichever first occurs, but not to exceed four years after the date of the alleged act, omission, neglect, or occurrence.

. . . .

Utah Code § 78B-5-818

. . . .

(3) No defendant is liable to any person seeking recovery for any amount in excess of the proportion of fault attributed to that defendant under Section 78B-5-819.

(4) (a) The fact finder may, and when requested by a party shall, allocate the percentage or proportion of fault attributable to each person seeking recovery, to each defendant, to any person immune from suit, and to any other person identified under Subsection 78B-5-821(4) for whom there is a factual and legal basis to allocate fault. . . .

Utah Code § 78B-5-819

(1) The trial court may, and when requested by any party shall, direct the jury, if any, to find separate special verdicts determining the total amount of damages sustained and the percentage or proportion of fault attributable to each person seeking recovery, to each defendant, to any person immune from suit, and to any other person identified under Subsection 78B-5-821(4) for whom there is a factual and legal basis to allocate fault.

. . . .

Utah Code § 78B-5-820

(1) Subject to Section 78B-5-818, the maximum amount for which a defendant may be liable to any person seeking recovery is that percentage or proportion of the damages equivalent to the percentage or proportion of fault attributed to that defendant.

. . . .

STATEMENT OF THE CASE

Nature of the Case

Sharlene Call ("Ms. Call") initiated this action against Dr. John Keiter, a plastic surgeon, alleging that he had committed malpractice in his medical treatment of her. A jury found in favor of Ms. Call, and Dr. Keiter now appeals the verdict.

Facts

In this medical malpractice action, Sharlene Call asserted a claim against Dr. Keiter for treatment he provided to her for problems she experienced with her left breast. (R. at 001-2.) Ms. Call was born with a chest deformity known as pectus excavatum. (R. at 002.) This deformity causes the chest to be concave and often requires reconstructive surgery to allow development of the chest and the internal organs. Ms. Call had reconstructive surgery when she was a child.

In 1981, Ms. Call first saw Dr. Keiter. (R. at 262.) Dr. Keiter performed breast augmentation, using silicone implants. (R. at 262-63.) Ms. Call had the silicone implants for about 13 years without incident. (R. at 263.) In 1995, Ms. Call stated that she believed the implant ruptured when she was hugged, and later, she saw Dr. Keiter because she felt a lump in her left breast. (R. at 263, 277.) Dr. Keiter removed the lump, which turned out to be a silicone granuloma, and also replaced both implants with saline implants. (R. at 263, 266.) During this surgery, Dr. Keiter confirmed that the left implant was leaking silicone into Ms. Call's breast cavity, and he removed as much of the silicone from her breast as he could. (R. at 263, 266, 281.) During the treatment in 1995, Dr. Keiter told Ms. Call that silicone had leaked, that it had created the granuloma that he removed, and that some of the silicone remained in her breast cavity and could cause future problems. (R. at 263-64, 307.)

Indeed, four years later, Ms. Call developed another lump in her left breast. (R. at 264.) In July 1999, Ms. Call returned to Dr. Keiter for treatment. In September 1999,

Dr. Keiter performed surgery to remove the lump and confirmed that the lump was a silicone granuloma. He continued to treat her during this period through January 2000. (R. at 264-65, 282.) During this treatment, Dr. Keiter again told Ms. Call that residual silicone from the 1995 rupture remained in her body and that she would most likely develop additional granulomas. (R. at 264-65, 282-83, 307.) During the surgery to remove the granuloma, Dr. Keiter also removed the implant, cleaned it, and reinserted it into Ms. Call's chest. During the surgery, Dr. Keiter had to thin some of the skin tissue in her left breast. (R. at 307.)

Later in November 2000, Ms. Call returned to Dr. Keiter for treatment of a wound that had developed at the bottom of her left breast near the area where Dr. Keiter had previously removed the implant and thinned her skin tissue in 1999. (R. at 265, 284-86.) Dr. Keiter continued to treat Ms. Call through October 15, 2001, at which point she switched to different physicians for treatment. (R. at 284-292, 316.)

Procedural Details of Case and Disposition of the Case Below

Well before trial, Dr. Keiter filed a Notice of Intent to Apportion Fault to Dow Corning on the basis that it manufactured the silicone breast implant that ruptured and leaked silicone into plaintiff's breast. (R. at 95-96.) Subsequently, Dr. Keiter filed a second notice listing additional implant manufacturers because it was unclear who the actual manufacturer was. (R. at 655-656.)

In addition to asking the trial court to apportion fault to the implant manufacturer, Dr. Keiter filed a motion for summary judgment, arguing that Ms. Call failed to initiate

this action within the applicable statute of limitations. Dr. Keiter argued that Ms. Call knew the requisite facts to trigger the statute of limitations by July 1999, when she returned for surgery to remove silicone granulomas. (R. at 262-64.) Dr. Keiter's motion was supported by the parties' deposition testimony, Ms. Call's discovery responses, and her own expert's criticism of Dr. Keiter's care. (R. at 262-66, 282-83, 307, 336-37, 340.)

Ms. Call's opposition memorandum failed to contradict any of the material facts in Dr. Keiter's motion regarding when she learned of her cause of action. (R. at 574-78.) Her opposition memorandum admitted that Dr. Keiter was negligent prior to the date of the claims that she intended to assert at trial. (R. at 585.) Indeed, Ms. Call argued this evidence was relevant evidence at trial, despite the fact that she was not making a claim for this conduct. (R. at 585.) Ms. Call's opposition was largely premised on her argument that she was not seeking to recover damages for care provided prior to 2000 and she sought only to recover damages for care rendered on or after December 18, 2000. (R. at 585.)

The trial court partially granted Dr. Keiter's motion, but it issued a final order concluding that Ms. Call's claims after December 18, 2000 were still viable. (R. at 691-92.) Later, the trial court clarified that the parties could introduce evidence related to Dr. Keiter's pre-2000 treatment; however, the trial court told the parties they could refer to the pre-2000 treatment only in a "neutral" manner. (R. at 1816: 3-5.)

Ms. Call filed a trial brief which, among other claims, indicated that Dr. Keiter was negligent in his treatment of her beginning with the December 18, 2000 surgery

because he failed to remove the contaminated material from her breast pocket during that surgery. (R. at 1152.) She later elaborated on this claim and stated that Dr. Keiter failed to remove scar tissue and "free silicone" that existed in the pocket. (R. at 1154-55.) This criticism was identical to her expert's criticisms of Dr. Keiter's care in the 1995 and 1999 surgeries. (Compare R. at 1152, 1154-55 with R. at 266, 336-37, 340.)

At trial, Dr. Keiter moved for a direct verdict. Dr. Keiter referenced the summary judgment ruling and the trial court's previous ruling and argued that Ms. Call could not recover damages related to additional or future silicone removal and that she had already been compensated for a defective implant. (R. at 1820: 480.) The trial court largely denied Dr. Keiter's motion. (R. at 1820:489-93.)

After trial, Dr. Keiter submitted a post-trial motion that renewed his motion for a directed verdict. (R. at 1287-1346.) The trial court denied Dr. Keiter's post-trial motions. (R. at 1794-97.) Subsequently, Dr. Keiter filed this appeal. (R. at 1804-05.)

SUMMARY OF ARGUMENTS

Ms. Call's testimony established that Dr. Keiter told her that silicone remained in her body after her implant ruptured in 1995 and that she would likely experience future problems due to the residual silicone. Ms. Call's expert witness, Dr. Robert Miner, criticized the care Dr. Keiter provided to Ms. Call in both the 1995 and 1999 surgeries as being below the applicable standard of care. At trial, Ms. Call requested damages for surgeries to remove silicone granulomas created by the residual silicone.

Notwithstanding these undisputed facts, the trial court partially denied Dr. Keiter's motion for summary judgment, which argued that Ms. Call possessed the requisite factual knowledge to begin the two-year statute of limitations in 1999. This was error.

The trial court accepted Ms. Call's argument that she sought to recover only for injuries she sustained after December 18, 2000. Accordingly, the trial court ruled that any claims for injuries prior to December 18, 2000 were barred by the statute of limitations, but Ms. Call could proceed with her claims after that cut-off date. Furthermore, the trial court allowed Ms. Call to introduce evidence of the treatment that was provided by Dr. Keiter prior to December 18, 2000. The result was a confusing trial in which the jury heard extensive evidence relating to the time-barred treatment coupled with Ms. Call's claim for damages incurred after the trial court's limitations cut-off date.

In addition to this confusing evidence, the jury heard evidence that Ms. Call's first breast implants were defective. The jury learned that one of the implants ruptured in 1995 and leaked silicone into Ms. Call's body. Dr. Keiter and Ms. Call's expert, Dr. Miner, told the jury it was impossible to remove all of the silicone after a rupture. The defect in the silicone implant and the rupture were not the fault of Dr. Keiter.

When Dr. Keiter asked to apportion fault and to list the implant manufacturer on the special verdict, the trial court denied his request. Because the implant manufacturer's defective implant ruptured before the limitations cut-off date and the silicone leaked into

Ms. Call before this date, the trial court ruled that Dr. Keiter had not provided a sufficient basis to apportion fault to the implant manufacturer. This was error.

Finally, the trial court was given an opportunity to revisit its earlier rulings on both Dr. Keiter's summary judgment motion and his request to apportion fault when Dr. Keiter moved for a directed verdict after the close of Ms. Call's case-in-chief and in his post-trial motions. The trial court sealed Dr. Keiter's fate when it denied these motions.

ARGUMENT

I. The trial court erred in partially denying Dr. Keiter's motion for summary judgment.

The trial court should have granted Dr. Keiter's motion for summary judgment in full, because the statute of limitations accrued in 1999 at the latest. Ms. Call's own expert stated that the real trigger for her claims was the 1995 and 1999 surgeries, during which Dr. Keiter failed to remove all of the silicone and set in motion the silicone granulomas and need for later surgeries. When Dr. Keiter moved for summary judgment, Ms. Call argued that she was alleging negligence relating only to the December 18, 2000 surgery and subsequent treatment in an effort to avoid the clear statute of limitations problems that she faced.

Plaintiffs are not allowed to split their causes of action to fit within applicable statutes of limitation, and they are not allowed to pick arbitrary cut-off dates but still introduce evidence of and rely on evidence of antecedent treatments to bolster their

claims. This is precisely what Ms. Call did, and it was the trial court's failure to grant Dr. Keiter's summary judgment motion that allowed Ms. Call to change and mold her claims to avoid the statute of limitations, thereby creating jury confusion and prejudice to Dr. Keiter.

A. The undisputed facts establish that Ms. Call had the requisite knowledge to trigger the statute of limitations in 1999.

Although Ms. Call claims she is attempting to recover only for negligent treatment of her infection from December 18, 2000 forward, her own testimony established that she knew of her injuries in 1999, and her expert established that the injuries were related to the earlier treatment. Because Ms. Call knew of her injury in 1995 and again in 1999, she had, at the latest, two years in which to commence this action. *See* Utah Code Ann. § 78B-3-404 ("A malpractice action against a health care provider shall be commenced within two years from 1999 after the plaintiff or patient discovers, or through the use of reasonable diligence should have discovered the injury, whichever first occurs, but not to exceed four years after the date of the alleged act, omission, neglect, or occurrence.").

Ms. Call, however, failed to file her notice of intent within the two-year statute of limitations for a medical malpractice claim. The term "injury" as used in the statute means "legal injury", which has been interpreted to require that a plaintiff "knew or should have known that he had sustained an injury and that the injury was caused by negligent action." *See Foil v. Ballinger*, 601 P.2d 144, 148 (Utah 1979). Dr. Keiter

moved for summary judgment, setting forth undisputed facts to establish that Ms. Call had the requisite knowledge under the *Foil* test to trigger the statute of limitations as early as 1999. Specifically, Dr. Keiter's motion established the following sequence of events before 2000:

> Ms. Call first presented to Dr. Keiter on or about June 12, 1981 for breast augmentation, and she saw Dr. Keiter for corresponding post-operative care through April 6, 1982. After April 6, 1982, Ms. Call did not see Dr. Keiter for over thirteen years.
>
> Ms. Call next saw Dr. Keiter on May 25, 1995, complaining of a lump in the area of her left breast. Radiology studies were performed which indicated that the left implant was ruptured.
>
> Dr. Keiter performed surgery on May 25, 1995 and removed the left breast mass, removed the right and left silicone implants, and inserted bilateral saline implants.
>
> At the time of her May 25, 1995 surgery, Dr. Keiter informed Ms. Call that he could not remove all of the silicone and that she may experience problems in the future as a result.
>
> Ms. Call next saw Dr. Keiter on July 30, 1999, complaining of lumps in the area of her left breast.
>
> At this time, Ms. Call was aware that she was experiencing problems associated with retained silicone, which a biopsy later confirmed. This problem necessitated a surgery on September 13, 1999 to remove a silicone granuloma.

(R. at 262-64.) Although Ms. Call saw Dr. Keiter for additional treatments after these events, these events and Ms. Call's knowledge of them were sufficient to trigger the statute of limitations. Specifically, Ms. Call's notice of intent, which was not filed until October 18, 2002, was filed more than a year too late as the statute of limitations would

have commenced in July 1999, when Ms. Call saw Dr. Keiter for lumps in her breast that were caused by retained silicone.

In opposing Dr. Keiter's motion, Ms. Call argued: "Contrary to defendant's Motion, and despite the defendant's attempt to misconstrue the bases of Ms. Call's claims against him, Ms. Call's claims are not based upon any of the defendant's actions which occurred prior to October 18, 2000. Instead, the bases of all of Ms. Call's claims against the defendant stem entirely from the surgeries that the defendant performed for Ms. Call on December 18, 2000; August 27, 2001; October 15, 2001; and the care (not) provided after those surgeries." (R. at 584.) In an effort to get the best of both worlds, Ms. Call also argued that "evidence of the defendant's **negligence prior** to October 18, 2000, is still relevant to the claims at issue." (R. at 585 (emphasis added).)

In order to understand how Dr. Keiter arrived at the position where he would seemingly misunderstand the nature of Ms. Call's claims, Ms. Call's verified complaint and discovery responses must be examined. Ms. Call's verified complaint contained two paragraphs of facts to provide notice to Dr. Keiter as to the nature of her claims. In her verified complaint, Ms. Call made the following factual allegations:

> 8. Sharlene Call suffers from a condition known as pectus excavatum deformity that has required numerous reconstructive surgeries. Dr. Keiter has performed and provided medical services for Sharlene Call.
>
> 9. Sharlene Call, among other problems, has developed abscesses and ulcers. Dr. Keiter has treated for the abscesses, ulcers, by removing the breast implants and implanting new breast implants.

(R. at 002.) Ms. Call's verified complaint contains no other factual background to provide Dr. Keiter notice of the nature of her claims. No dates or specific treatments are referenced; however, one specific event that is reference is the new breast implant. Dr. Keiter replaced the implants during the 1995 surgery, lending some credence to his belief that she was claiming negligence related to treatment provided prior to 2000.

Accordingly, Dr. Keiter served written discovery requests to have Ms. Call identify the bases for her claims. Dr. Keiter's interrogatory number 7 asked: "Describe in detail the acts, omissions and conduct of Defendant upon which you base your allegation that Defendant was negligent in rendering or failure to render medical care." (R. at 265, 331.) In response, Ms. Call answered: "Dr. Keiter breached the standard of care by not properly diagnosing and/or treating the severe infection Ms. Call developed from her breast surgery. Also see Dr. Miner's report." (R. at 265-66, 331 (emphasis added).) Significantly, Dr. Miner's report indicated that Dr. Keiter was negligent in both the May 25, 1995 surgery and the September 13, 1999 surgery in failing to remove all of the free silicone that existed in Ms. Call's breast after her implant ruptured. (R. at 266, 337.) Moreover, Dr. Miner later testified in his deposition that the 1995 surgery fell below the standard of care "and really set up everything else for a downfall, because in not getting rid of that silicone, that led to the silicone granuloma." (R. at 266, 340.)

According to Ms. Call's own expert witness, then, the critical, triggering negligent treatments were the 1995 and 1999 surgeries in which Dr. Keiter failed to remove silicone and failed to properly clean out the capsule in Ms. Call's breast.

Nonetheless, to avoid summary judgment, Ms. Call shifted position and claimed that the resulting infection in 2000 was the starting point for her claims and the statute of limitations, and it was Dr. Keiter's inability to treat the infection from that point on that was negligent.

In partially denying Dr. Keiter's motion for summary judgment on the statute of limitations, the trial court concluded that any claims arising prior to December 18, 2000 were time-barred and determined that Ms. Call's claims related only to treatment after December 18, 2000. (R. at 691-92.) Accordingly, the trial court ruled that no material facts existed as to Ms. Call's knowledge of the alleged negligence prior to 2000. Despite that ruling, the trial court determined that Ms. Call could pursue her claim for negligence as it related to any injuries after 2000.

In reviewing the trial court's ruling on Dr. Keiter's summary judgment motion, this Court does not need to accept the trial court's conclusions. *See, e.g., Snow v. Rudd*, 2000 UT 20, ¶13, 998 P.2d 262 (reversing trial court's denial of summary judgment on statute of limitations). On appeal, the appellate court needs only to review whether the trial court erred in its application of the law and whether a material fact was in dispute. *See Holmes Dev., LLC v. Cook*, 2002 UT 38, ¶21, 48 P.3d 895. The reviewing court must view the facts in the light most favorable to the non-moving party; however, when the facts are not in dispute and are susceptible to a determination as a matter of law, the reviewing court may reverse a trial court's improper denial of summary judgment. *See id.* at ¶¶13-15. In *Snow*, the Utah Supreme Court concluded the trial court had erred in

denying defendant's summary judgment motion, stating: "This is a clear case of a plaintiff simply sitting on her rights." *Id.* at ¶13.

Similarly, Ms. Call in this case sat on her rights and failed to timely file her complaint. The undisputed facts demonstrate that Ms. Call knew in 1995 that it was impossible to remove all of the silicone in her breast, and that she would likely develop granulomas in the future. As anticipated, Ms. Call had follow-up surgery in September 1999 to remove a silicone granuloma that developed because of the residual silicone in her breast. Ms. Call was aware of what necessitated this 1999 surgery. Ms. Call's own expert was critical of the treatment Dr. Keiter provided in both the 1995 and 1999 surgeries. Because the facts related to these surgeries were not disputed and because these facts were sufficient to trigger the running of the two-year statute of limitations, Ms. Call needed to file her notice of claim within two years from the September 1999 surgery at the latest. The trial court implicitly recognized that Ms. Call's suit was untimely when it granted Dr. Keiter's motion as to any claim prior to December 18, 2000.

The trial court erred in granting only partial summary judgment. In addition to being critical of Dr. Keiter's care in both the 1995 and 1999 surgeries, Ms. Call's expert also discussed that these two surgeries "really set up everything else for a downfall." (R at 266, 340.) When taken together, the trial court's ruling and Ms. Call's own expert's opinion establish all the facts necessary to grant Dr. Keiter's motion for summary judgment in its entirety. The trial court ruled Ms. Call had the requisite knowledge prior to December 18, 2000, and Ms. Call's expert established that the post-2000 injury was a

result of the pre-2000 treatment. Thus, the trial court should have granted Dr. Keiter's motion in full because Ms. Call's action was untimely.

B. Ms. Call cannot avoid the statute of limitations by limiting her claims to only the post-2000 treatment.

In opposition to Dr. Keiter's motion for summary judgment, Ms. Call argued that Dr. Keiter was improperly characterizing her claims and that her claims were limited to his treatment from December 18, 2000 onward. Ms. Call did not substantively oppose Dr. Keiter's motion, but instead argued that he simply misunderstood her claims. This attempt to mold her claims to meet the statute of limitations flies in the face of well-established Utah law.

1. *Ms. Call limited her claims only after Dr. Keiter filed his motion.*

In opposing Dr. Keiter's motion, Ms. Call purported to clarify that her claims were only for treatment after December 18, 2000. But under Utah law, a plaintiff cannot change her theory of the case or offer new theories in order to oppose a motion for summary judgment. The Utah Supreme Court has held that a "plaintiff cannot amend the complaint by raising novel claims or theories for recovery in a memorandum in opposition to a motion to dismiss or for summary judgment because such amendment fails to satisfy Utah's pleading requirements." *Holmes Dev., LLC v. Cook*, 2002 UT 38, ¶31, 48 P.3d 895; *see also Harper v. Evans*, 2008 UT App 165, ¶14, 185 P.3d 573. Undoubtedly, Ms. Call will argue that she was not changing her claim in opposing Dr.

Keiter's motion for summary judgment, but rather, her claim has always been solely for the post-2000 injury. The record, however, shows otherwise.

Ms. Call's complaint alleges only that Dr. Keiter treated Ms. Call and that Ms. Call has suffered some general injuries; it was vague and ambiguous as to the specifics of her claim, even under a liberal notice-pleading standard, and did not give Dr. Keiter notice of the nature, basis, or grounds for her claim. *See MBNA America Bank, N.A. v. Goodman*, 2006 UT App 276, ¶6, 140 P.3d 589 (stating plaintiff "must only give the defendant fair notice of the nature and basis or grounds of the claim and a general indication of the type of litigation involved."). Indeed, Dr. Keiter may have been able to move for a more definite statement. *See Canfield v. Layton City*, 2005 UT 60, ¶14, 122 P.3d 622. Because such motions are disfavored, *see id.*, Dr. Keiter served discovery requests on Ms. Call to determine the specifics of her claim.

In her response, Ms. Call again identified her general injuries in her verified complaint and incorporated by reference her expert witness's opinion. Ms. Call's expert witness identified both these general injuries and also identified the 1995 and 1999 surgeries as being below the standard of care and setting everything in motion for the 2000 infection. Thus, prior to filing his summary judgment motion, Dr. Keiter was on notice that Ms. Call was seeking to recover for care provided after December 2000 and also the allegedly sub-standard surgeries that predated the December 2000 surgery.

Moreover, in her opposition memorandum, Ms. Call stated:

> Although the bases of Sharlene Call's claims against the defendant in this lawsuit stem entirely from the surgeries that the defendant performed for Sharlene Call on December 18, 2000; August 27, 2001; October 15, 2001; and the care provided after those surgeries, evidence of the defendant's negligence prior to October 18, 2000, is still relevant to the claims at issue.

(R. at 585.) In other words, Ms. Call acknowledged her belief that Dr. Keiter was negligent prior to December 18, 2000 and that his early negligence was relevant and admissible at trial; however, Ms. Call also said that she was not asserting a claim for the earlier negligence.

Ms. Call's tactic is not allowed under Utah law. Ms. Call amended and limited her claims to the post-December 18, 2000 treatment only to avoid the statute of limitations. She did so for the first time in opposition to Dr. Keiter's motion for summary judgment. She acknowledged that she believed Dr. Keiter's early care was also negligent, but she contended that she wanted to use that evidence at trial only to support her claims that were not barred by the statute of limitations. A plaintiff cannot have it both ways to avoid the statute of limitations.

2. *Ms. Call cannot isolate certain treatment from other related treatment in order to avoid triggering a limitations period.*

Although a plaintiff is entitled to be master of her claim, she cannot cherry-pick certain events in a series of related treatments in order to preclude a statute of limitations defense. This issue invokes certain policy considerations that the Utah Legislature

contemplated in creating the language of the statute governing when the limitations period begins.

The Utah Legislature has expressed its desire to require potential medical malpractice claimants to actively pursue their claims. In contrast to other general statutes of limitations that are not triggered until a plaintiff learns of the full extent of injury and has knowledge of each element of a claim, the medical malpractice statute of limitations begins to run when a person has some injury and knowledge that the injury may be linked to negligence. *See* Utah Code Ann. § 78B-3-404; *Foil v. Ballinger*, 601 P.2d 144, 148 (Utah 1979). Interpreting this standard, this Court has differentiated between knowledge of a legal cause of action and knowledge sufficient to trigger the medical malpractice statute of limitations. *See Deschamps v. Pulley*, 784 P.2d 471, 475 (Utah Ct. App. 1989) (holding a legal determination of negligence is not necessary, but rather only facts that would lead a reasonable person to conclude that she may have claim). The medical malpractice statute of limitations is triggered when a reasonable person is put on inquiry notice that a claim may exist—regardless of whether a lawyer or expert witness has confirmed the validity of the legal claim.

If plaintiffs can pick and choose from events in a related series of treatment, statutes of limitations would have no meaning, because plaintiffs could simply exclude earlier treatment and assert claims based only on the more recent events within the limitations period. For example, in *Harper v. Evans*, the plaintiff filed a complaint identifying two surgeries as being negligent. After the defendant filed a motion for

summary judgment, the plaintiff argued the surgeries were not negligent, but rather the physician's post-operative care was negligent and the cause of the plaintiff's injuries. In addition, the plaintiff belatedly argued the continuous negligent treatment rule. *See Harper v. Evans*, 2008 UT App 165, ¶6, 185 P.3d 573. This court rejected each of the plaintiff's attempts to avoid the statute of limitations. *See id.*

In *Harper*, the plaintiff attempted to do an end run around the statute of limitations period by reclassifying her claims. In this case, the considerations are no different. Ms. Call knew that claims based on the earlier procedures were hopelessly time-barred, and accordingly, she changed her position and identified the December 2000 treatment as the basis for her claims because then her notice of intent would have been timely.

In some instances, a patient may legitimately be able to isolate treatment from a single health care provider; however, this is not that case. First, the treatment from 1995 on was inextricably linked to the later care and treatment. Moreover, the record shows that Ms. Call had the requisite knowledge under the statute to trigger the limitations period in 1995 or, by the latest, in 1999; and the record also shows that Ms. Call's own expert was critical of earlier treatment and believed that it set the wheels in motion to cause Ms. Call's injury. In light of the established and uncontested facts in the record, Ms. Call cannot argue that the earlier treatment was non-negligent while the treatment in the limitations period was negligent.

In *Steele v. Organon, Inc.*, the plaintiff was incorrectly warned about taking ergotamine, a vascular constrictor, for her migraine headaches. *See id.*, 716 P.2d 920 (Wash. Ct. App. 1986). In *Steele*, the plaintiff overdosed on the drug and was hospitalized with ergot poisoning in 1973. In 1974, the plaintiff consulted with an attorney about whether she had a claim, but her doctors did not believe there was a link between her injury and the overdose. Seven years later, the plaintiff suffered a heart attack and stroke, and a doctor advised her that these injuries were related to the 1973 overdose.

As Ms. Call did in this case, the plaintiff in *Steele* argued she was not damaged by the overdose until her later heart attack and stroke. The Washington Court of Appeals disagreed, stating: "Where an injury, although slight, is sustained in consequence of the wrongful act of another, and the law affords a remedy therefore, the statute of limitations attaches at once." *Id.* at 234. The *Steele* court went on to state that "[i]t is not material that all the damages resulting from the act shall have been sustained at that time, and the running of the statute is not postponed by the fact that the actual or substantial damages do not occur until a later date." *Id.* The court, citing policy considerations for statutes of limitations, went on to reject the plaintiff's arguments that the ergot poisoning and the heart attack were separate and distinct injuries with different statutes of limitations. *See id.* at 235; *see also Withers v. Sterling Drugs, Inc.*, 319 F. Supp. 878, 881 (S.D. Ind. 1970) (holding plaintiff could not split cause of action into one for temporary injury and one for permanent injury).

The common theme of these other opinions is that a plaintiff cannot split a cause of action in an effort to avoid the statute of limitations, which begins to run once some harm manifests itself. A plaintiff is not required to appreciate or know the full extent of the harm in order to trigger the statute of limitations. These same considerations are present in Utah cases addressing the statute of limitations under the Utah Health Care Malpractice Act.

Recently, the Utah Supreme Court has clarified the application of Utah's one action rule in the context of medical malpractice claims. In *Medved v. Glenn*, the Utah Supreme Court held that Utah's one action rule required a plaintiff to assert a claim once some harm has manifested itself, even if plaintiff anticipated some future harm might arise. *See id.*, 2005 UT 77, ¶14, 125 P.3d 913. Further, the Supreme Court noted that failing to assert a claim once some injury was present "may very well preclude any subsequent attempts at recovery." *Id.* In *Medved*, the Supreme Court relied on and clarified its earlier ruling in *Seale v. Gowans*, in which it held that the possibility of future harm without any present injury did not constitute a legally cognizable injury and did not trigger the statute of limitations. *See Seale v. Gowans*, 923 P.2d 1361, 1364-65 (Utah 1996). In *Medved*, the Court held a present injury along with the possibility of future harm did trigger the statute of limitations. *See Medved*, 2005 UT 77 at ¶14.

Both *Seale* and *Medved* involved a physician's failure to timely diagnose cancer. In *Seale*, because of the misdiagnosis, the plaintiff faced an increased risk of the cancer's recurrence. When the cancer returned three years later, the plaintiff filed a lawsuit. The

Supreme Court held the lawsuit was timely because the increased possible chance of cancer was not a legally cognizable injury until the cancer actually returned and plaintiff had suffered damages. *See Seale*, 923 P.2d at 1364-65. In *Medved*, the physician also failed to timely diagnose cancer. When the cancer was later discovered, the plaintiff underwent a radical and invasive surgery to remove the cancer and also faced an increased risk of the cancer's recurrence. The plaintiff filed a claim based on the more invasive surgery and also for her increased risk of the cancer's recurrence. The Supreme Court distinguished *Medved* from *Seale* because the plaintiff had also claimed present injury from the invasive surgery to remove the cancer. *See Medved*, 2005 UT 77 at ¶14.

Recognizing the one action rule and the rule against splitting causes of action, the Supreme Court in both *Seale* and *Medved* reaffirmed that "once some harm is manifest, the limitations period begins to run on all claims, present and future." *Seale*, 923 P.2d at 1364; *see also Medved*, 2005 UT 77 at ¶14. Specifically, the Supreme Court cited to other opinions that expressly disapproved of splitting causes of action or separating present injuries from later-developing injuries. *See Seale*, 923 P.2d at 1364. Under the court's analysis, it is debatable whether the court would adopt the chain of causality rule discussed above. But even if it did, Ms. Call's injuries are all related and would not create separate chains of causation.

Finally, any claim that the early injuries were temporary or that the infection was new, more severe, or more serious have been rejected under Utah law. *See Duerden v. Utah Valley Hospital*, 663 F. Supp. 781, 784-86 (D. Utah 1987), *relying on Hove v.*

McMaster, 621 P.2d 694 (Utah 1980); *Reiser v. Lohner*, 641 P.2d 93 (Utah 1982). Consistent with *Seale* and *Medved*, this early trilogy of cases in Utah held that the statute of limitations begins to run when any injury manifests itself and rejected the plaintiffs' arguments that a belief that the injury was only minor or temporary in nature did not trigger the limitations period.

Recently, a federal district court reaffirmed that any injury is sufficient to trigger the statute of limitations—regardless of a plaintiff's subjective belief as to the nature or duration of the injury. *See Cannon v. Minnesota Mining and Mfg. Co.*, 2009 WL 350561 (D. Utah 2009) (relying on *Seale*, *Duerden,* and *Reiser*, the district court held that products liability statute began to run when plaintiff experienced minor reaction to medication which he thought was a temporary allergic reaction). Under Utah law, plaintiff cannot split her December 2000 injuries from the earlier treatment in order to avoid the statute of limitations. Because the uncontested facts show that Ms. Call knew of her injury by 1999 and the injury was related to the other earlier injuries, the trial court erred in only partially granting Dr. Keiter's motion for summary judgment.

3. *Ms. Call's complaint does not allege continuous negligent treatment.*

Ms. Call's complaint does not discuss any of the treatment provided or give sufficient detail to put Dr. Keiter on notice that she intended to invoke the continuous negligent treatment rule. Under Utah law, a plaintiff's complaint must contain sufficient allegations to put a defendant on notice that the plaintiff intends to invoke the continuous

negligent treatment rule as the basis for a claim. *See Harper v. Evans*, 2008 UT App 165, ¶¶9-14, 185 P.3d 573.

As discussed, Ms. Call's complaint contains only the barest of allegations regarding Dr. Keiter's treatment and alleged negligence. Ms. Call did not raise the continuous negligent treatment rule until after Dr. Keiter moved for summary judgment. (R. at 587-88.) Indeed, Ms. Call raised this theory as alternative theory only in the event that the trial court determined the earlier treatment should be considered in determining when the statute of limitations began to run. In *Harper*, this Court stated: "In so holding, we emphasize that we cannot rely on the allegations of a negligent course of treatment raised for the first time in the Harpers' opposition to summary judgment." *Id.* at ¶14. Similarly, Ms. Call cannot rely on the continuous negligent treatment rule in order to avoid the statute of limitations.

Finally, even if the continuous negligent treatment rule had been timely raised, it would not apply to this case. In *Collins v. Wilson*, the Utah Supreme Court noted: "If the patient learns of negligence during the time of treatment . . . . the discovery rule applies and the statute of limitations begins to run accordingly." *Id.*, 1999 UT 56, ¶10, 984 P.2d 960. In this case, Ms. Call learned in 1995 and was reminded in 1999 that Dr. Keiter had not removed all of the silicone and that it could cause problems later. In fact, the 1999 surgery was required because all of the silicone had not been removed in 1995. Because the undisputed facts show that Ms. Call knew of these facts, the statute of limitations

would have begun in 1999 at the latest and the continuous negligent treatment rule would not apply.

C. The trial court's ruling created confusion at trial, and the trial court erred in creating an arbitrary cut-off date that governed the evidence at trial.

In partially denying Dr. Keiter's motion for summary judgment and allowing Ms. Call to recover for treatment after December 18, 2000, the trial court's ruling permeated the remainder of the proceedings, creating confusion and additional errors. The trial court ruled that Ms. Call could claim negligence for treatment rendered after December 18, 2000, and also ruled that her claims prior to that date were barred by the statute of limitations. (R. at 691-92.) Later at the pre-trial conference, the trial court's ruling was clarified to allow the introduction of evidence relating to the treatment prior to the cut-off date as long as the evidence was presented in a "neutral" manner. (R. at 1816: 3-5.) Accordingly, the parties were able to discuss Ms. Call's entire treatment history with Dr. Keiter; however, Ms. Call could not introduce evidence or testimony to suggest that the treatment prior to December 18, 2000 was negligent.

At trial, Ms. Call's theory of the case, as presented by her expert witness, Dr. Miner, was that Dr. Keiter was negligent in treating the infection for which she sought treatment after December 18, 2000. But her expert, Dr. Miner, opined that the infection had been present in Ms. Call's body since the earlier treatments (in 1995 and 1999). Moreover, Dr. Miner criticized Dr. Keiter's earlier treatment of Ms. Call on multiple occasions, contending that Dr. Keiter never properly removed or treated the infection.

Although Dr. Miner was careful not to say expressly that the pre-2000 care was negligent, he offered veiled criticisms and references to the pre-2000 treatment.

Dr. Miner presented the jury with a "nidus" of infection theory. (R. at 1819: 320.) According to Dr. Miner, a nidus is a nest and a source for contamination. Dr. Miner testified that the breast formed a capsule around the implant that became the nidus for the infection because of the silicone that leaked from the implant. Later, the infection manifested itself on the surface in the hole where Dr. Keiter had removed the implants and where Dr. Keiter had testified to thinning the skin during the 1999 surgery. (R. at 1819: 323-27, 330.)

In expanding on his nidus of infection theory, Dr. Miner repeatedly testified that the infection was created from the early 1995 and 1999 surgeries. (R. at 1819: 339-42.) Specifically, Dr. Miner described Ms. Call's infection as being "chronic" and "smoldering." Dr. Miner analogized the situation to having a pocket full of honey. He said that if you remove an object from the pocket of honey, wash the honey off, and put it back into the pocket, then the object will still have honey on it. (R. at 1819: 342.) Dr. Miner said that Ms. Call's breast had a chronic—and therefore *preexisting*—infection that Dr. Keiter never properly treated, but rather, Dr. Keiter would simply take the implant out, wash it off, and put it back into the infected capsule. (R. at 1819: 342-43.)

In describing this course of treatment, Dr. Miner was criticizing Dr. Keiter's treatment of Ms. Call both before the cut-off date and after the cut-off date. In fact, Dr. Miner's criticism of Dr. Keiter's treatment was premised on the fact that he kept treating

Ms. Call in the same manner without curing what Dr. Miner believed was the root of the problem. (R. at 1819: 343.) Specifically, Dr. Miner testified that Dr. Keiter's treatment on December 18, 2000 fell below the standard of care because "once he sees this is a recurring problem – and remember this is the **third time** he's taking out the granuloma in the same place – a bell has to go off and say, hey, something else is going on." (R. at 1819: 344-45 (emphasis added).) Furthermore, when asked if the treatment on December 18, 2000 was appropriate, Dr. Miner testified:

> [I]t's like the analogy with the honey. You're going to get honey back on it. And that's exactly what it did. The honey was still there; the bacteria was still there. He hadn't done anything **to that point or after that point** that truly rendered the pocket as sterile as he could get it. And as long as you keep doing that, like I said, you keep taking the same road, you keep getting the same result.

(R. at 1819: 346 (emphasis added).)

Even though the jury heard Dr. Miner's testimony criticizing Dr. Keiter's treatment of Ms. Call both prior to December 18, 2000 and after that date, the jury was instructed that Ms. Call's claims were only for negligence that occurred after December 18, 2000. This is a classic example of a bell that cannot be un-rung.

Moreover, if Dr. Miner's nidus of infection theory was accurate, it only lends further support to Dr. Keiter's motion for summary judgment. Dr. Miner testified the 1995 and 1999 surgeries set the wheels in motion for the later problem—the infection. At trial, Dr. Miner testified the infection was a chronic problem and a smoldering

infection. As such, Ms. Call knew of the chronic problem as early as 1995 and not later than 1999 when she required a follow up surgery to remove a granuloma. Given the trial court's difficulty in addressing the issue, it is not surprising the jury was also confused by the evidence presented at trial. The trial court should have granted Dr. Keiter's summary judgment motion in full.

II. The trial court should have allowed the jury to apportion fault to the breast implant manufacturer

As was well-established at trial, Ms. Call's silicone breast implants were defective, an implant ruptured and leaked silicone into her breast, and the leaked silicone created Ms. Call's silicone granulomas.[1] Simply put, the implant's rupture started the chain of causation that led to Ms. Call's developing silicone granulomas and needing surgical and other treatment.

The primary policy behind Utah's comparative fault statutory scheme[2] is the principle that no defendant should be held liable for more than his or her share of fault.

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[1] *See, e.g.*, R. 1819: 280, 316-17, 323-24, 385; 1820: 458-59, 461-66, 526, 539, 614-15; 1821: 715, 731, 735-36, 740, 767, 816-17.

[2] The comparative fault statutory scheme is sometimes referred to as the Liability Reform Act. In 1986, the Legislature abolished joint and several liability in favor of a comparative fault approach. *Yirak v. Dan's Super Markets, Inc.*, 2008 UT App 210, ¶4, 188 P.3d 487. Prior to 2008, those statutes were codified at sections 78-27-37 through 78-27-43 of the Utah Code. After renumbering in 2008, the statutes governing comparative fault are now contained in sections 78B-5-817 through 78B-5-823.

See Utah Code Ann. § 78B-5-818(3) (stating "[n]o defendant is liable to any person seeking recovery for any amount in excess of the proportion of fault attributed to that defendant"); *id.* § 78B-5-820; *Sullivan v. Scoular Grain Co.*, 853 P.2d 877, 880 (Utah 1993), *superseded by statute on other grounds* (quoting senate floor debate and noting statement that "it is the basic fairness concept we're driving at. The defendant ought to be on the hook only for its own percentage of damages, but ought not be the guarantor for everyone else's damages.").

In this case, the jury could have apportioned fault to three people or entities: the implant manufacturer, Dr. Keiter, and Ms. Call. But because the jury was allowed to apportion fault only between Dr. Keiter and Ms. Call, Dr. Keiter was forced to shoulder responsibility for the manufacturer's negligence. This is in direct contravention to the express provisions of and the policy considerations underlying the comparative fault statute.

A. Dr. Keiter has a statutory right to have the jury apportion fault to the implant manufacturer.

The trial court erred when it denied Dr. Keiter's multiple requests to apportion fault to the implant manufacturers. Under section 78B-5-819(3), the

> fact finder may, and *when requested by a party shall*, allocate the percentage or proportion of fault attributable to each person seeking recovery, to each defendant . . . [and] to any person immune from suit, . . . for whom there is a factual and legal basis to allocate fault.

Utah Code Ann. § 78B-5-818(4)(a) (emphasis added); *see also id.* § 78B-5-819(1) (stating "trial court may, and *when requested by any party shall*, direct the jury . . . to find separate special verdicts" regarding causation and damages (emphasis added)). All of the conditions for mandatory apportionment were met by Dr. Keiter.

Dr. Keiter made two written requests to allocate fault, and throughout the trial itself repeatedly asked the court to instruct and allow the jury to apportion fault to the manufacturer of the implant that ruptured and leaked silicone into Ms. Call's body. Ample evidence was presented at trial that the silicone implant had ruptured, that it was defective, and that it was the direct and proximate cause of the silicone granulomas for which Ms. Call sought treatment from Dr. Keiter. *See* n.1. Dr. Keiter established a factual and legal basis to support his request for apportioning fault to the implant manufacturer.

Accordingly, under section 78B-5-818 the trial court was required to instruct the jury that it could apportion fault to the manufacturer and was required to include the manufacturer on the special verdict form. *See also Paulos v. Covenant Trans., Inc.*, 2004 UT App 35, ¶11, 86 P.3d 752 ("'All parties are entitled to have their theories of the case submitted to the jury in the court's instructions, provided there is competent evidence to support them.'" (citation omitted)).

B. Allowing apportionment minimizes the potential for confusion, promotes the interests of justice, and ensures that no party is held liable for another person's negligence.

Aside from being mandated by section 78B-5-818 in these circumstances, allowing the jury to apportion fault to the implant manufacturer furthers the important policy interests embodied in Utah's comparative fault statutory scheme. First, apportionment serves the primary goal of ensuring that no defendant is held liable for another person's fault. "'[T]rue apportionment cannot be achieved unless that apportionment includes all tortfeasors guilty of causal negligence either causing or contributing to the occurrence in question, whether or not they are parties to the case.'" *Sullivan.*, 853 P.2d at 882 (quoting Carroll R. Heft & C. James Heft, *Comparative Negligence Manual*, § 8.100, at 14 (John J. Palmer & Stephen M. Flanagan eds., rev. ed. 1992)).

In addition, special verdicts are "useful tools that assist jurors in making step-by-step findings in complex cases[.]" *Dixon v. Stewart*, 658 P.2d 591, 594 (Utah 1982). This case presented a complex set of facts for which a special verdict would have greatly aided the jury. The trial court and the parties repeatedly acknowledged the difficulties created by the fact that Ms. Call's cause of action ran only from December 18, 2000 forward, but the implant had ruptured years previously—and that without the rupture, there would have been no granulomas. During one colloquy, the trial court noted that if the jury was not allowed to apportion fault as contemplated in the statute, "I think the

jury is going to be confused. They are going to think they have to apportion fault to the defendant or the plaintiff and when it comes down to injuries caused by silicone or the silicone implant that she had in 1981 and that continues apparently to cause her problems, they won't know what to do with that information."[3] (R. at 1821: 832.) The trial court had noted that it was "unfair" that "no one got to go in and make a comparison between any, if there was any negligence between Dr. Keiter and the breast implant producer[.]" (R. at 1821: 676.)

The jury was instructed not to consider events predating the December 18, 2000 surgery, but that instruction did not cure the potential for confusion (nor did it ameliorate the harm to Dr. Keiter). Ms. Call argued that Dr. Keiter should have removed more silicone than he did in the 2000 surgery. But because there was no dispute that the

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[3] There was considerable back-and-forth on the issue of whether apportionment should be allowed, and at several points the trial court and the parties contemplated that apportionment would be required if Ms. Call was claiming damages for future surgeries (because those would stem from the granulomas that were caused by the ruptured silicone implants). (*See, e.g.*, R. at 1821: 837 (court stated "I think we can craft [a] . . . special verdict form that says . . . [i]f you decide to award damages for future situations then you must compare how much of that is Dr. Keiter and how much of that is related to Dr. Keiter's treatment if so, and how much is located to the product—"); 840-41 (court stated "[how much is the fact that that stuff [silicone] is there is because every doctor, even your doctor testified that you can't remove it entirely and so the question becomes then do you have to make it comparative on that damage? If she needs future surgeries to remove these, how much of that is attributable to Dr. Keiter's care and how much of that is attributed to the fact that the silicone was there in the first place?").) Indeed there was significant shifting of positions on what, exactly, Ms. Call was claiming. Ultimately, in closing argument Ms. Call did ask for damages for future surgeries to "cleanup" the former implant's pocket and insert new implants (R. at 984-85), and the jury was asked to enter an amount for future medical expenses on the verdict form.

granulomas were there solely because of the leaked silicone and there was no dispute that it was impossible for *any* doctor to remove all of the silicone, the jury must have wondered—just as the trial court queried—"how much of that is attributable to Dr. Keiter's care and how much of that is attributed to the fact that the silicone was there in the first place?" (R. at 1821: 840.) The mere fact that the trial court struggled so mightily with delineating the temporal and causal limitations of Ms. Call's claims, and whether those boundaries required apportionment, shows the high likelihood that a lay jury would be greatly confused by the same questions.

But even aside from the policy implications of refusing apportionment and the confusion created for the jury, it remains true that under section 78B-5-818 Dr. Keiter was entitled to ask the jury to apportion fault because he made a timely request and because he provided a factual and legal basis to support his request to apportion fault. As a matter of law and as a matter of sound public policy, the jury should have been allowed to apportion fault to the implant manufacturer.

C. Not allowing the jury to apportion fault was incorrect as a matter of law and warrants reversal and remand

The jury heard ample evidence that the implant was defective and ruptured, and that the silicone in Ms. Call's body could never be fully removed. Without the presence of silicone from the ruptured implant, Ms. Call would never have developed the silicone granulomas and need for surgery that were the subject of this suit. In other words, the fact that the implant was defective and leaked silicone into Ms. Call's body was a

triggering, causal event in the chain of events that led to Ms. Call's surgical and medical treatment by Dr. Keiter.

Although the jury could have apportioned fault among the implant manufacturer, Dr. Keiter, and Ms. Call, it was allowed only two choices for apportionment. As a result, it is highly likely that the jury attributed to Dr. Keiter any fault that it would otherwise have attributed to the manufacturer.

This result violates the plain language of section 78B-8-818(4), the policy considerations underlying Utah's comparative fault scheme, and notions of fundamental fairness. An error is harmful if "'absent the error, there is a reasonable likelihood of a more favorable outcome for the appellant[.]'" *Hill v. Allred*, 2009 UT 28, ¶30, ___ P.3d ___ (May 1, 2009) (quoting *State v. Dunn*, 850 P.2d 1201, 1209 n.3 (Utah 1993)).

Given the undisputed evidence that silicone from the ruptured implant caused Ms. Call's granulomas, and that it was this silicone that necessitated Ms. Call's later surgeries and medical treatment, it is highly likely that the jury would have apportioned some fault to the implant manufacturer. This, in turn, would have reduced any damages award against Dr. Keiter. Accordingly, the trial court's error was harmful. If this Court declines to reverse the trial court's denial of Dr. Keiter's summary judgment motion, this case should be reversed and remanded with instructions to allow the jury to use a special verdict to apportion any finding of fault among the implant manufacturer, Dr. Keiter, and Ms. Call.

III. The trial courts should have granted Dr. Keiter's motion for a directed verdict and his post-trial motions

A. Reasonable Minds Could Not Have Differed On the Evidence Presented By Ms. Call, Which Showed That Ms. Call's Claimed Damages Were Caused By The Leaked Silicone and Were Thus Barred By The Statute of Limitations

The trial court erred in denying Dr. Keiter's motion for a directed verdict at the close of Ms. Call's case-in-chief, in which Dr. Keiter argued that Ms. Call's damages related to the silicone and its removal were precluded by evidence presented and the statute of limitations. (R. at 1820: 480.)

Dr. Keiter argued that Ms. Call could not recover any damages related to silicone or removal of silicone because Dr. Miner admitted it was impossible to remove all of the silicone, the presence of silicone was due to the rupture of the implant, and the statute of limitations had run on the rupture of the implant. (R. at 1820:479-81.) Ms. Call saw Dr. Keiter in 1995 and indicated her implant had ruptured. During the treatment in 1995, Ms. Call was informed that Dr. Keiter was unable to remove all of the silicone and she would need future treatment. Ms. Call's expert, Dr. Miner, corroborated that it was impossible to remove all of the silicone. In ruling on the summary judgment motion, the trial court ruled that Ms. Call could not recover for any treatment provided prior to December 18, 2000. Furthermore, Ms. Call received compensation from a class-action settlement because the implant was defective and could rupture – as it did.

The trial court denied this motion. Specifically, the trial court determined that Dr. Miner, although noting it was impossible for any physician to remove all of the silicone, criticized Dr. Keiter for not removing more of it. (R. at 1820: 490.) The trial court incorrectly noted that Dr. Miner was not critical of the pre-2000 care and used this as a basis to deny the motion. (R. at 1820: 490.) In fact, as set forth above, Dr. Miner *did* criticize the early treatment and indicated that it set everything in motion for the later granulomas.

In addition, Dr. Keiter's motion noted that plaintiff was seeking to recover damages solely related to the removal of silicone granulomas. These damages were both before and after the cutoff date. Ms. Call should not have been allowed to recover these damages.

Furthermore, as discussed in point II of this brief regarding apportionment of fault, the trial court incorrectly believed this issue was one for the jury to decide. The trial court stated: "I think [plaintiff gets] to go to the jury and argue the weight of how much of that is attributed to Dr. Keiter and how much of that is going to just naturally come because unfortunately the silicone burst but that's an issue that the jury has to resolve." (R. at 1820: 490.) The jury, however, could not apportion fault to the implant manufacturer. Because this claim was barred by the statute of limitations and the evidence at trial did not support the claim, reasonable minds could not differ on the evidence presented and the trial court erred in denying the motion for a directed verdict.

See Management of Graystone Pine Homeowner's Ass'n ex rel. Owners of Condominiums v. Graystone Pines, Inc., 652 P.2d 896 (Utah 1982).

B. Because Ms. Call Failed to Show That Her Injuries Were Caused By Dr. Keiter's Treatment, the Trial Court Should Have Granted Dr. Keiter's Post-Trial Motions

Dr. Keiter renewed his motion for a directed verdict and his summary judgment arguments in his post-trial motion, and the trial court erred in denying this motion. In his post-trial motion, Dr. Keiter requested a judgment notwithstanding the verdict because Ms. Call failed to demonstrate that her injuries were caused by Dr. Keiter's treatment. Specifically, Dr. Keiter argued the evidence at trial showed that Ms. Call's injuries could just as easily have resulted from the leaked silicone or the earlier surgeries for which Ms. Call could not recover as from the treatment rendered on or after December 18, 2000. (R. at 1293, 1297-98.)

Dr. Keiter also argued in the alternative for a new trial under Rule 59 because of the improper introduction of evidence at trial related to silicone and silicone retention-related injuries, and because he was not able to apportion fault to the implant manufacturer after this evidence was admitted. (R. at 1298-1300.) Specifically, at trial, the jury repeatedly heard evidence related to injuries caused by the residual silicone in Ms. Call's breast. As discussed earlier in this brief, Ms. Call's theory of the case was that she was injured by an infection that arose from the residual silicone left in her breast after the 1995 rupture and Dr. Keiter repeatedly failed to treat this infection. Further, Ms. Call

requested damages for the costs of surgeries after 2000 that related solely to the removal of silicone granulomas.

At trial, the jury heard about the retained silicone after the 1995 rupture, the resulting infection, and the multiple visits to Dr. Keiter both before and after the cut-off date. The jury heard Dr. Miner's nidus of infection theory and his criticisms of both Dr. Keiter's pre- and post-cut-off date treatment of Ms. Call. The jury, however, was not given any opportunity to apportion fault to the implant manufacturer after hearing this evidence.

These rulings were erroneous because the claims based on residual silicone and related injuries were barred by the statute of limitations. (R. at 1299.) After the evidence came in at trial, Dr. Keiter should have been allowed to list the implant manufacturer on the special verdict form in order to limit the prejudicial effect of that evidence.

The trial court has broad discretion in ruling for new trial; in this case, the trial court's denial was an abuse of discretion. *See Crookston v. Fire Ins. Exch.*, 817 P.2d 789 (Utah 1991). The trial court partially denied Dr. Keiter's motion for summary judgment and set a cut-off date for the claims that Ms. Call could pursue at trial. The trial court precluded Dr. Keiter from listing the implant manufacturer on the special verdict because it concluded that Ms. Call could not pursue any claims before the cut-off date and thus, Dr. Keiter had no need to apportion fault to a non-party whose acts occurred prior to the cut-off date. After the trial court heard the evidence introduced at trial regarding silicone retention and the source of the infection; however, it should have realized the need to

allow Dr. Keiter to apportion fault to the manufacturer. Dr. Keiter renewed his request during the arguments relating to jury instructions and the special verdict. The trial court compounded these errors when it denied Dr. Keiter's post-trial motion. This Court should reverse the trial court's denial of Dr. Keiter's post-trial motions.

CONCLUSION

This Court should reverse the trial court's grant of partial summary judgment to Dr. Keiter. Because there were no disputed issues of material fact and Dr. Keiter was entitled to judgment as a matter of law, this Court owes no deference to the trial court's ruling and may conclude as a matter of law that summary judgment in full was proper.

In the alternative, this Court should reverse and remand for a new trial to allow Dr. Keiter to apportion fault to the implant manufacturer. As a final option in the alternative, this Court should reverse the trial court's denial of Dr. Keiter's post-trial motions and direct that judgment be entered in Dr. Keiter's favor.

DATED this 26th day of June, 2009.

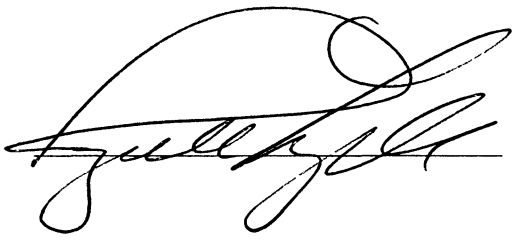
RICHARDS BRANDT MILLER NELSON

CHRISTIAN W. NELSON
TAWNI J. ANDERSON
ZACHARY E. PETERSON
ANNE D. ARMSTRONG
Attorneys for Defendant/Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two true and correct copies of the foregoing brief were mailed, first-class, postage prepaid, on this 24 day of June, 2009, to the following:

D. David Lambert
Don R. Petersen
HOWARD, LEWIS & PETERSEN
120 East 300 North Street
P.O. Box 1248
Provo, Utah 84603



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ADDENDUM

Rule 56. Summary judgment.

(a) For claimant. A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move for summary judgment upon all or any part thereof.

(b) For defending party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move for summary judgment as to all or any part thereof.

(c) Motion and proceedings thereon. The motion, memoranda and affidavits shall be in accordance with Rule 7. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case not fully adjudicated on motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of affidavits; further testimony; defense required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the pleadings, but the response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. Summary judgment, if appropriate, shall be entered against a party failing to file such a response.

(f) When affidavits are unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits made in bad faith. If any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party presenting them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

CHRISTIAN W. NELSON [5771]
ANNE D. ARMSTRONG [8886]
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IN THE SECOND JUDICIAL DISTRICT COURT OF WEBER COUNTY
STATE OF UTAH

SHARLENE CALL, Plaintiff, vs. JOHN E. KEITER, M.D., Defendant.	**ORDER** Case No. 030903501 Judge Brent W. West

On October 27, 2006, the following motions came before the Court: Defendant John E. Keiter, M.D.'s Motion *In Limine* Regarding Evidence of Liability Insurance; Defendant John E. Keiter, M.D.'s Motion *In Limine* Regarding Application of the Collateral Source Rule; Defendant's Motion *In Limine* Re: Noneconomic Damages Cap; Plaintiff's Motion for In Camera Inspection of the Notice of Intent; Defendant's Motion *In Limine* to Strike Plaintiff's Expert Witness Robert T. Miner, M.D. and to Exclude Evidence; Defendant's Motion for Summary Judgment; Defendant's Request for Judicial Notice; and Plaintiff's Motion for Sanctions.

The Court, having reviewed the relevant pleadings and documents, and otherwise being fully advised, now makes and enters the following FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDERS:

DEFENDANT JOHN E. KEITER, M.D.'S MOTION *IN LIMINE* REGARDING EVIDENCE OF LIABILITY INSURANCE

The Court HEREBY GRANTS Defendant's Motion *In Limine* Regarding Evidence of Liability Insurance. The motion and supporting memorandum were filed on or about October 9, 2006. Plaintiff presented no written opposition. The motion was introduced by counsel for Defendant during the October 27, 2006 hearing. Counsel for Plaintiff confirmed in open court that Plaintiff does not oppose the motion.

DEFENDANT JOHN E. KEITER, M.D.'S MOTION *IN LIMINE* REGARDING APPLICATION OF THE COLLATERAL SOURCE RULE

The Court HEREBY GRANTS Defendant's Motion *In Limine* Regarding Application of the Collateral Source Rule. The motion and supporting memorandum were filed on or about October 9, 2006. Plaintiff presented no written opposition. The motion was introduced by counsel for Defendant during the October 27, 2006 hearing. Counsel for Plaintiff confirmed in open court that Plaintiff does not oppose the motion.

DEFENDANT'S MOTION *IN LIMINE* RE: NONECONOMIC DAMAGES CAP

The Court HEREBY GRANTS Defendant's Motion *In Limine* Re: Noneconomic Damages Cap. The motion and supporting memorandum were filed on or about October 9, 2006.

Plaintiff presented no written opposition. The motion was introduced by counsel for Defendant during the October 27, 2006 hearing. Counsel for Plaintiff confirmed in open court that Plaintiff does not oppose the motion.

PLAINTIFF'S MOTION FOR IN CAMERA INSPECTION OF THE NOTICE OF INTENT

The motion and supporting memorandum were filed by Plaintiff on or about October 20, 2006. Defendant presented no written opposition. The motion was introduced by counsel during oral argument related to Defendants' Motion *In Limine* to Strike Plaintiff's Expert Witness Robert T. Miner, M.D. and to Exclude Evidence. Counsel for Defendant confirmed in open court that Defendant does not oppose *in camera* inspection of the Notice of Intent. The Court GRANTED Plaintiff's motion, whereupon a brief recess was taken and , judge, court reporter, bailiff and counsel reconvened in chambers for the Court's *in camera* inspection of the Notice of Intent.

DEFENDANTS' MOTION *IN LIMINE* TO STRIKE PLAINTIFF'S EXPERT WITNESS ROBERT T. MINER, M.D. AND TO EXCLUDE EVIDENCE

The Court HEREBY GRANTS IN PART, AND DENIES IN PART Defendants' Motion *In Limine* to Strike Plaintiff's Expert Witness Robert T. Miner, M.D. and to Exclude Evidence. The motion and supporting memorandum were filed on or about October 9, 2006. A written memorandum in opposition was filed by Plaintiff on or about October 20, 2006. By Order of the Court, and stipulation of the parties, no Reply Memorandum was submitted relative to this

motion, due to the parties' desire for an expedited hearing. Based on the above-described pleadings and on argument presented by both parties, the Court, now makes and enters the following FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER:

FINDINGS OF FACT

1. The Court finds that Plaintiff, through counsel, inappropriately disclosed the Notice of Intent to Commence Medical Malpractice Action regarding her claim to her expert witness, Dr. Miner.

2. The Court finds that Dr. Miner relied on the Notice of Intent to Commence Medical Malpractice Action in at least the following ways: forming his opinions and in creating his report.

CONCLUSIONS OF LAW

1. The Court concludes that, under Utah law, a Notice of Intent to Commence Medical Malpractice Action (hereinafter "Notice of Intent") is a confidential part of the pre-litigation process and that Utah law prohibits the disclosure of the document to an expert witness.

2. The Court also concludes that it has discretion as to the remedy to impose as a result of Plaintiff's inappropriate disclosure of the confidential Notice of Intent to Dr. Miner. The Court will not require Plaintiff to obtain a new expert witness. However, Defendant is entitled to cross examine Dr. Miner with respect to all of his activity and involvement in this

matter and the foundation and bases for any and all opinions, testimony and reports, including, without limitation all documents and in particular Plaintiff's Notice of Intent. The Court will later determine how to allow this cross examination without disclosing to the jury or during trial that Dr. Miner obtained this information, at least in part, through the confidential Notice of Intent.

ORDER

1. Defendant shall have 3 days in which to request an evidentiary hearing, at which Dr. Miner will be required to appear at Plaintiff's expense, for purposes of discovering the extent to which Dr. Miner relied upon and/or otherwise utilized Plaintiff's Notice of Intent to Commence Malpractice Action.

2. At the trial of this matter, Defendant shall be permitted to introduce Plaintiff's Notice of Intent to Commence Medical Malpractice Action and to cross examine Dr. Miner with respect to the same, in open court and before the jury. However, the document will be re-titled and will not be referred to as the Notice of Intent to Commence Medical Malpractice Action or any similar name. Apart from the title, the document shall be the same document in every respect as Plaintiff's Notice of Intent to Commence Medical Malpractice Action, which is the subject of this motion. The name by which this document will be identified at trial, will be decided by stipulation of the parties, or by Court Order, on or before the first day of trial.

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The Court GRANTS IN PART AND DENIES IN PART Defendants' Motion for Summary Judgment. The motion and supporting memorandum were filed on or about October 10, 2006. A written memorandum in opposition was filed by Plaintiff on or about October 24, 2006. By Order of the Court, and stipulation of the parties, no written Reply Memorandum was submitted relative to this motion, due to the parties' desire for an expedited hearing. Based on the above-described pleadings and on argument presented by both parties, the Court, now makes and enters the following FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER:

FINDINGS OF FACT

1. The Court finds that Plaintiff seeks to recover damages for allegedly negligent medical treatment rendered by Defendant only on and/or after December 18, 2000.

CONCLUSIONS OF LAW

1. Plaintiff's claims, if any, regarding negligent care and treatment occurring before December 18, 2000 are barred by the Utah Malpractice Act statute of limitations.

2. Plaintiff's claims regarding negligent care and treatment occurring on or after December 18, 2000 remain viable at this time.

ORDER

1. Plaintiff is only entitled to recover damages for conduct which occurred on or after December 18, 2000.

2. Considering the potential prejudice related to this issue, the extent to which, and the manner in which, Plaintiff will be permitted to present evidence, at the time of trial, related to medical care and treatment rendered by Dr. Keiter to Plaintiff prior to December 18, 2000 will be determined at a future pre-trial conference.

3. Defendant may renew his Motion for Summary Judgment on statute of limitations grounds after the presentation of Plaintiff's case and/or after the presentation of Defendant's case.

DEFENDANT'S REQUEST FOR JUDICIAL NOTICE

The Court HEREBY GRANTS IN PART AND DENIES IN PART Defendant's Request for Judicial Notice. The motion and supporting memorandum were filed on or about October 9, 2006. A written memorandum in opposition was filed by Plaintiff on or about October 24, 2006. By Order of the Court, and stipulation of the parties, no written Reply Memorandum was submitted relative to this motion, due to the parties' desire for an expedited hearing. Based on the above-described pleadings and on argument presented by both parties, the Court, now makes and enters the following FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER:

FINDINGS OF FACT

1. The Chapter 11 Bankruptcy Filing Record for Dow Corning Corporation, a copy of which is attached to Defendant's Request for Judicial Notice, is information sufficient to allow the Court to take judicial notice of the fact that Dow Corning Corporation filed for Chapter 11 bankruptcy on or about May 15, 1995.

2. The December 2, 1999, United States Bankruptcy Court Amended Opinion on the Classification and Treatment of Claims, a copy of which is attached to Defendant's Request for Judicial Notice, is information sufficient to allow the Court to take judicial notice of the fact that, as part of the Dow Corning Corporation bankruptcy, a trust was created to compensate claimants who received silicone breast implants.

CONCLUSIONS OF LAW

1. Pursuant to Rule 201 of the Utah Rules of Evidence, "[a] court shall take judicial notice if requested by a party and supplied with the necessary information."

ORDER

1. Judicial notice is hereby taken of the fact that Dow Corning Corporation filed for Chapter 11 bankruptcy on or about May 15, 1995.

2. Judicial notice is hereby taken of the fact that, as part of the Dow Corning Corporation bankruptcy, a trust was created to compensate claimants who received silicone breast implants.

3. Judicial notice of other facts included in Defendant's Request for Judicial Notice is not taken at this time.

PLAINTIFF'S MOTION FOR SANCTIONS

The Court HEREBY DENIES Plaintiff's Motion for Sanctions. The motion and supporting memorandum were filed by Plaintiff on or about October 18, 2006. The October 27, 2006 hearing occurred prior to the time in which a responsive pleading was to be filed. As a result, no further briefing was submitted. Plaintiff's motion was introduced by Defendant during the hearing and ruled on from the bench.

Dated this 22ND day of DECEMBER, 2006.

BY THE COURT:

HONORABLE BRENT W. WEST
District Court Judge

APPROVED AS TO FORM:

D. David Lambert
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument was mailed, first-class, postage prepaid, on this 15 day of December, 2006 to the following:

D. David Lambert
HOWARD, LEWIS & PETERSEN
120 East 300 North Street
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Attorneys for Plaintiff

Christian W. Nelson
Anne D. Armstrong
RICHARDS, BRANDT, MILLER & NELSON
50 South Main Street, Suite 700
Salt Lake City, Utah 84144
Attorneys for Dr. Keiter

Ellen Mitchell

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the general damage claims, the disfigurement and can't reach and those types of claims, but the depression she said she cannot link and no one has linked medically and again it's a medical malpractice case, it's not just a run of the mill personal injury case but no medical expert has linked the depression to anything in this particular case or anything that Dr. Keiter did. No one has linked the inability to lift to anything Dr. Keiter did within the statutory period and again remember, we've got these prior surgeries. We've got these prior surgeries, we've got the (inaudible) surgery, we've got the surgery to place the silicone implants, all that created scar tissue. No one has said, well, I can separate medically out the scar tissue that was created from those surgeries to the later surgeries which are within the statutory period and I can tie her inability to lift or do some of these things, the depression specifically, only to that period and that has to be done medically, it's the plaintiff's burden to do that. And same with the fever, chills and night sweats.

Thank you, Your Honor.

THE COURT: The Court is prepared to rule. I'll take them in the order that Mr. Nelson raised the issues. I'm denying - and some of these are quite frankly close calls. I'm denying the Motion for Directed Verdict on the silicone removal. Viewing the case in the plaintiff's best

light, their claim against Dr. Keiter is that there was a pattern of treatment that they feel that he was deficient in doing. I do believe Dr. Miner testified that there were opportunities where Dr. Keiter could have mitigated or had an opportunity to relieve the silicone. Yes, he testified that once the silicone implant burst, they were always going to be dealing with the issue of silicone but he went on to testify that he felt that had Ms. Call received the appropriate treatment, the appropriate cleaning, the fact that he was put on notice that there were these white things that appeared to be silicone, that he had opportunities during his pattern of treatment to mitigate or attack that, I think they get to go to the jury and argue the weight of how much of that is attributed to Dr. Keiter and how much of that is going to just naturally come because unfortunately the silicone burst but that's an issue that the jury has to resolve.

In regards to the total capsulectomy, I would deny the Motion for Directed Verdict there. I do think Dr. Miner made it perfectly clear the patient has options available to her and I don't think we can ignore the fact that she has to decide at some point whether she wants to go through life unbalanced or without the symmetry and the possibilities are replacing the left one and bringing that out, if you can, or perhaps she could choose to have the right one taken out even though there isn't anything wrong with it or anything that's

indicated that there's anything wrong in it in order to be balanced and to have symmetry and to avoid future problems like this. She's testified at great lengths about how she's afraid of having the operation and so she's been reluctant to make that decision but I think again, viewing the evidence in the best light of the plaintiffs is their argument is through Dr. Keiter's pattern of treatment. She's in a position now where she's got a left breast and a right breast, they're not the same, they're asymmetrical, she's put in that situation and she eventually will have to make a decision as to which way to go.

I could not tell from Dr. Miner's testimony whether he was saying as a doctor he wouldn't go that way or whether he was saying he wouldn't do that or he wouldn't recommend that but he didn't say it wasn't impossible - excuse me, he didn't say it wasn't possible, he didn't say it wasn't something that should be considered. I suspect from what he said that if she said I want to do it, he might try to talk her out of it but he's also not going to be her future physician in that particular situation so I would allow that issue to go, I think it goes to weight.

In regards to the general damages I do agree with your argument on depression. There's been no link that has been made. I understand she had a predisposition to depression. I understand that this was a traumatic event but

even Dr. Miner, I don't think was able to say that this would cause or trigger in regards to the depression.

In regards to the can't lift, I think that does go to the jury. The scarring is a cumulative thing. She's had repeated surgeries, she's had repeated openings, she's had repeated wounds and it's tough to say, well, the original surgery caused the scarring or the second one or the third one or the fourth procedure or whatever. So the bottom line is the cumulative effect is the treatment of her breast, the surgery and everything else has caused the scar tissue which has placed restrictions on her abilities to do things and her inability to lift her arm, pick up her grandchildren and again, I think the jury gets to make that particular situation.

I also do think they get to go on the fevers, the chills and the night sweats. Yes, it can be argued by both sides that it may very well be the reflection of her age and menopause and those kinds of things but on the other hand, people who suffer from severe infections get fever, chills, night sweats. Those of you that have had sinus infections or had colds or had fevers, when the infection goes away if you've ever had a toothache, when the infection goes away, guess what, the fever goes away, the chills go away, the night sweats go away. I think Dr. Miner was candid in saying it could very well be attributable to menopause. She however

has testified several times that she's been at least twice while this lawsuit has been pending, indicating that she's not in menopause now and so it's a fair assumption to go to the jury that the fever, chills and night sweats, because they occurred at time when she may have been in menopause or when she had this substantial infection are attributable to that because her testimony is, once the infection was taken out, she's not as subject to those and is not in menopause. So again, I think it goes to the weight and she gets to argue that.

I do agree the evidence is in my opinion weak in regards to the fact that it triggered her depression. I think as a layman I could say, well, if you're prone to depression and you go through a traumatic thing, it may have triggered it again but I don't even think Dr. Miner's testimony went to that extent. So I would agree with you as far as the issue of depression, but otherwise I'd deny the directed verdict and allow them to do the jury on the other issues.

MR. NELSON: Thank you, Your Honor.

THE COURT: All right. Are you ready to start your case in chief?

MR. NELSON: We are.

THE COURT: All right, if you'll bring back in the jury please.

notice that if she sought recovery for harm caused by silicone, it was our position that that harm is attributable to the manufacturer.

Now as I understand it, they're limited to Dr. Keiter's care on December 18 forward. Now they wanted to, you know, leave the impression that he left silicone behind, that he should have removed the entire capsule but didn't, if he had he might have gotten more of the silicone; when he did the surgery he found strands of silicones. Mrs. Call has testified that she continues to have problems with silicone, that she continues to have silicone lumps removed, that that's the reason she saw Dr. Carabine, that's the reason she saw Dr. Brzowski. Those charges are on the special damages form. They are attempting to seek from Dr. Keiter recovery for injuries caused by silicone. No matter whose at fault, they're not permitted to do that against Dr. Keiter.

THE COURT: But the difficulty is the statute requires the jury to go through the process of comparing negligence and making a determination and apportioning that negligence in some way. I understand what you're telling me and the fact that you put them on notice may be sufficient in the sense that you preserve that right but the statute requires them to make an active, conscious process of comparing the negligence. And on the one hand you've said don't let them know anything about any alleged negligence

that Dr. Keiter did and that makes the process of comparison difficult, if not impossible, and that's where I struggle. You are correct in your reading of the statute, it requires a comparison of negligence but you've said, we don't get to talk about Dr. Keiter or anything that he may have done during that period so they had nothing to compare and that's where I think your analogy breaks down from my ruling is because they have nothing to compare and that's where I think it's unfair in trying to assess that because the statute does require them to compare the negligence and you've said don't let us testify as to any negligence that they have. I may very well agree with you on the issue of when we get to the point where if they make a finding that they have to determine damages, if they insist upon asking for damages in regards to the additional granulomas, then it may very well be inappropriate if they're going to consider damages in that area, they then can look and say how much of that damage is attributable to Dr. Keiter and how much of that damage would be attributable to the manufacturer? The more I've thought about that the more I agree on that is because one thing that's clear in this case, everybody knew once they got better information about the silicone that it would remain in your system and that there would be future surgeries and so I may agree with you on that point. My problem is I'm not prepared to give you cart blanche, compare negligence when

we're not allowed to have examined any negligence that Dr. Keiter may have done.

MR. LAMBERT: The only thing I would say is that whenever this issue came up in trial, we had a dialogue the Court imposed this order and at one time you asked me to articulate something and I didn't feel comfortable about getting into it in front of the jury and so we had a bench conference but we did, we complied with this order.

THE COURT: I agree and I understand - I wanted to make some more comments because I want to make my record as well. The fact that people may very well disagree, in my opinion is just saying there are disagreement factually as to what occurred or what the pattern of care was or whatever but the gravamen of my order was is that no one would be able to argue or make the comment that this constituted negligence for which Dr. Keiter would be liable for and they couldn't get up and argue that but the fact that Dr. Keiter says that he told her that they had an expectancy and she says they were going to last forever and she thought she was not going to have saline, neither one of you get to argue that, neither one of you get to argue that that's damages, neither one of you get to argue that that's negligence, neither one of you get to argue that there should be a monetary award for that but the fact that they disagree upon the history in my opinion, doesn't necessarily mean that they commented

negatively or they violated my order. They didn't structure their case around that but obviously Dr. Keiter and Ms. Call have legitimate disagreements about what was said in the office on the visits and the fact that they may disagree doesn't necessarily mean that they can draw an inference from that. This case is still about the alleged care that Dr. Keiter gave her from that December operation onward and it lives and falls with a finding of negligence, a finding of cause and a finding of damages in that particular thing and I am struggling with how to balance the settlement in regards to the material because everybody seems to be clear that once it was discovered, that material stays there and there will be reasons to go back.

MR. NELSON: I agree with you, Your Honor, it's only an issue when the damages are sought for the silicone and that's what brought this up because then what do we do with that? Anyway —

THE COURT: Well, I think we can craft an instruction that says, you know, special verdict form that says do you find this, do you find this, do you find this on the issue of damages. If you decide to award damages for future situations then you must compare how much of that is Dr. Keiter and how much of that is related to Dr. Keiter's treatment if so, and how much is located to the product —

MR. NELSON: That sounds appropriate.

INSTRUCTION NO. 29

Plaintiff claims that the care she received from Dr. Keiter on and after December 18, 2000 was negligent. Any information or evidence presented regarding care Plaintiff received from Dr. Keiter prior to December 18, 2000 has been presented for background information only. You are not to consider this information as part of Plaintiff's claims in this case.

INSTRUCTION NO. 30

In determining whether or not defendant was negligent in this case, you are not to consider any claims or allegations related to damage or injuries caused by silicone, including any claims regarding retained silicone, removed silicone or future care related to silicone, prior to December 18, 2000.

GWBN
WBN

IN THE SECOND JUDICIAL DISTRICT COURT
WEBER COUNTY, STATE OF UTAH

SHARLENE CALL,
Plaintiff,

vs.

JOHN E. KEITER, M.D.,
Defendant.

DECISION

Judge: W. Brent West
Clerk: Pamela Allen
Case: 030903501

The Court has before it a series of post trial motions. The Court will address all of the motions. The Court will not address the motions in the order in which they were filed. Instead, for its own convenience, the Court will address the motions in the order that the Court finds best suited for its rulings.

First, the order on the Motion to Tax Costs was approved and signed on August 1, 2008.

Second, the Plaintiff's Motion to Strike the Defendant's Reply Memorandum is denied. The Court has sufficient understanding of this case to rule on these motions.

Third, the Plaintiff's Motion to Strike the Affidavit of attorney Anne Armstrong is denied. An affidavit of an attorney is not necessary because Ms. Armstrong is an officer of the Court. In addition, a transcript would have been preferable, but again, the Court has sufficient understanding of this case to rule on these motions.

Fourth, the Court does not need an additional hearing or oral argument to resolve these motions. They are well briefed and actually deal with issues that have been previously raised and ruled upon.

Finally, the Defendant's Motions for a Judgment Not Withstanding the Verdict and a New Trial are denied. In addressing these motions, the Court will attempt to address all the sub-issues that have been raised by both parties.

The Court, even upon a second reflection, finds that the Plaintiff has met her burden of presenting a prima facie case of medical negligence. In its simplest form, the issue has always been whether or not the medical treatment that the Plaintiff received from the Defendant, since December 18, 2000, in regards to her breast enhancement surgery was negligent. That issue was disputed, the evidence went to a jury and the jury found for the Plaintiff.

The Defendant now attempts to break out various aspects of the Plaintiff's overall verdict and attack them individually. This would include the treatment of the Plaintiff's right breast, the total capsulectomy of the Plaintiff's left breast, additional disfigurement and avoidable scarring and any overlap of any negligent medical treatment by the Defendant, before or after December 18, 2000. The difficulty is that all these issues were submitted to the jury. The jury sorted them out and reached a general verdict. The jury was not asked to address these issues separately. This Court has no way of determining whether any or all of the damages were apportioned among these specific claims by the jury. The jury may have accepted or rejected all or a portion of each claim for damage.

On the other hand, the Court did address these issues separately and did make individual rulings on the admissibility of each of these sub-issues. Nothing has been presented, by either party, that would lead this Court to find that it ruled incorrectly in its determination of initial

admissibility. As previously indicated, the Court found that these issues, with some restrictions in some areas, were admissible and that the real issue was the weight to be given them by the triers of fact.

The Court attempts to try these cases as it finds them. Unfortunately, in this case, there was one extremely difficult factual scenario that needed to be addressed. In this instance the Plaintiff had received long term medical care and treatment from the Defendant. This resulted in a situation where the Defendant's medical care overlapped a period of time that was barred by the applicable statute of limitations. The Court addressed this situation the best it could. The Court fashioned a ruling and, more importantly, jury instructions that dealt with the situation as it existed. The Court did not want to create an artificial situation that would have favored one party or the other. The Court is satisfied with its ruling and jury instructions. Admittedly, the Appellate Courts may view this issue differently and that is their prerogative.

The Court found the testimony of Plaintiff's expert, Dr. Miner, to be admissible. The Court allowed him to testify to the jury. The Defendant again attacks the qualifications of Dr. Miner to testify. Again, the Court finds nothing that causes the Court to find that its initial ruling in regards to Dr. Miner was incorrect. Dr. Miner's qualifications were sufficient to allow him to testify. The weight that should have been given to his testimony was for the triers of fact to determine.

Lastly, there is nothing in the jury's verdict that would lead the Court to find that the jury's verdict was the result of passion or prejudice. In fact, the contrary is true. The jury was

extremely deliberate. They paid close attention to the trial, the issues and the arguments. Their verdict appears reasonable, rational and well thought out. They appear to have deliberated on all the issues and returned a well-supported verdict. There are clearly sufficient facts, in the trial, to support the jury's verdict.

Counsel for the Plaintiff will please prepare an Order, consistent with this Ruling.

Dated this 27th day of October 2008.

Judge W. Brent West
Second District Court

CERTIFICATE OF MAILING

I hereby certify that on the 30 day of October, 2008, I mailed a true and correct copy of the foregoing Decision to the parties as follows:

Don R. Petersen
D. David Lambert
PO Box 1248
Provo, Ut 84603

Christian W. Nelson
Anne D. Armstrong
PO Box 2465
Salt Lake City, Ut 84110-2465

Deputy Clerk